IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HAROLD L. CARE; LAWRENCE CLAAR; TREANTAFFELO KARAHALIAS; MICHAEL KLINE; GORDON KONEMANN; FRANCIS A. ROSSI; and LEE G. SMITH, Plaintiffs vs. THE READING HOSPITAL AND MEDICAL CENTER; JAKOB (JAPP) OLREE, Individually, and in His Capacity as Director of Facilities Management for The Reading Hospital and Medical Center, Inc.; JOHN AND JANE DOES 1 Through 20, Individually and in Their Capacities as Employees of The Reading Hospital and Medical Center, Inc., Defendants	)	Civil Action No. 2003-CV-04121

* * *

APPEARANCES:

RICK LONG, ESQUIRE
SIMON GRILL, ESQUIRE
On behalf of Plaintiffs

VINCENT CANDIELLO, ESQUIRE
On behalf of Defendants

* * *

O P I N I O N

JAMES KNOLL GARDNER,
United States District Judge

This matter is before the court on the Motion for Partial Reconsideration of the Court's April 1, 2004 Opinion and Order filed by defendants on April 13, 2004. Plaintiffs' Answer to Hospital Defendants' Motion for Partial Reconsideration of the Court's April 1, 2004 Opinion and Order was filed April 23, 2004. Because we conclude that plaintiffs' claims for invasion of privacy are not barred by the exclusivity provisions of the Pennsylvania Workmen's Compensation Act[1], we deny defendants' motion for partial reconsideration.

Jurisdiction

Jurisdiction is based upon federal question jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1441(b). Venue is proper pursuant to 28 U.S.C. § 1391(b) because the events giving rise to plaintiffs' claims allegedly occurred in this judicial district, namely, Berks County, Pennsylvania.

Factual Background

Plaintiffs are each employees of defendant The Reading Hospital and Medical Center ("Hospital") and worked in its engineering department. In their Complaint they seek damages against the Hospital and other defendants for violation of the

[1] Act of June 2, 1915, P.L. 736, art. III, § 303, as amended, 77 P.S. § 481(a).

Pennsylvania Wiretap Act, invasion of privacy and civil conspiracy.

Specifically, plaintiffs allege numerous unlawful interceptions of their oral communications by one or more of the defendants. The last such alleged interception occurred on January 22, 2002 during a meeting conducted by the Hospital's labor/management consultant Sue McQuen and the Hospital's Engineering Department employees, which included plaintiffs.

Plaintiffs contend that the meeting with the labor/management consultant was supposed to be confidential. They allege that while the consultant was going to report back to management certain concerns raised by the employees, the names of the employees expressing concerns would be kept confidential. Nevertheless, plaintiffs contend that company management directed a supervisor, former defendant Mark Balatgek, to tape-record the meeting for management. Plaintiffs' Complaint asserts that the alleged interception or oral communications was a continuing course of conduct by defendants.

Procedural Background

On June 16, 2003 Plaintiffs' Complaint ("Complaint") was filed in the Court of Common Pleas of Berks County, Pennsylvania. The Complaint alleges multiple violations of the Pennsylvania Wire Tapping and Electronic Surveillance Control Act

("Wiretap Act")[2] (Counts I, II, III, V, VI, and VIII) and Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III")[3] (Counts IV, VII and IX), as well as pendent state law claims for civil conspiracy (Counts X, XI and XII), invasion of privacy (Count XIII), negligent supervision (Counts XIV, XV and XVI) and respondeat superior liability (Count XVII).

On July 14, 2003 defendant The Reading Hospital and Medical Center together with individual defendants Jakob (Japp) Olree, Michael Forbes, Richard Mable and Paul McCoy, with the concurrence of defendant Mark Balatgek, removed this action to this court. Plaintiffs did not contest removal.

By Order and Opinion of the undersigned dated March 31, 2004 and filed April 1, 2004, we granted in part and denied in part The Reading Hospital and Medical Center, Inc.'s, Jakob Olree's, Michael Forbes', Richard Mable's and Paul McCoy's Motion to Dismiss. Specifically, we denied defendants' motion to dismiss Counts I through VII and a portion of Count XIII of Plaintiffs' Complaint alleging invasion of privacy relating to incidents occurring prior to January 22, 2002. We granted defendants' motion to dismiss Counts X, XI, XII, XIV, XV, XVI, XVII and that portion of Count XIII alleging the January 22, 2002 incident involving invasion of privacy.

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[2] 18 Pa.C.S.A. §§ 5701-5781.

[3] 18 U.S.C. §§ 2510-2522.

By Rule 16 Status Conference Order of the undersigned dated November 12, 2004 we dismissed defendants Michael Forbes, Richard Mable and Paul McCoy from this action.[4] On December 21, 2004 plaintiffs filed a Stipulation of Dismissal regarding defendant Mark Balatgek.

Standard of Review

Rule 7.1(g) of the Rules of Civil Procedure for the United States District Court for the Eastern District of Pennsylvania allows a party to make a motion for reconsideration. "The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence". Harsco Corp. v. Zlotnicki, 779 F.2d 905, 909 (3d Cir. 1985).

The moving party must establish one of three grounds to prevail on a motion for reconsideration: (1) the availability of new evidence not previously available; (2) an intervening change in controlling law; or (3) the need to correct a clear error of law or prevent manifest injustice. Brunson Communications Inc. v. Arbitron, Inc., 246 F.Supp.2d 446-447 (E.D. Pa. 2003).

A motion for reconsideration may not be used to present for the first time new legal theories or to raise new arguments

[4] In our November 12, 2004 Order we noted that in our March 31, 2004 Order and Opinion we dismissed Counts X, XI and XII of plaintiffs' Complaint, the only counts which related to defendants Michael Forbes, Richard Mabel and Paul McCoy. However, our March 31, 2004 decision did not specifically dismiss these defendants from this action. By our November 12, 2004 Order, we dismissed those defendants consistent with our March 31, 2004 decision.

that could have been made in support of the original motion. Moreover, a motion for reconsideration may not advance new facts, issues or arguments not previously presented to the court. Farnsworth v. Manor Healthcare Corp., No. Civ.A. 01-33, 2004 U.S. Dist. LEXIS 4383 at *5 (E.D. Pa. February 10, 2004).

Discussion

Defendants contend that in our March 31, 2004 decision, we erred by not entirely dismissing plaintiffs' claim for invasion of privacy (Count XIII).[5] Specifically, defendants contend that plaintiffs' claims for invasion of privacy are barred by the exclusivity provisions of the Pennsylvania Workmen's Compensation Act ("WCA").

The WCA provides, in pertinent part, that "the liability of an employer under this act shall be exclusive and in place of any other liability to such employees...in any action at law or otherwise on account of any injury or death defined in [§ 411] or occupational disease in [§ 27.1]."

Furthermore, the WCA defines "injury" and "injury arising in the course of employment" as follows:

> [I]njuries sustained while the employe is actually engaged in the furtherance of the business or affairs of the employer...and shall include all injuries caused by the

[5] In our March 31, 2004 decision, based upon the expiration of the statute of limitations, we dismissed that portion of Count XIII alleging an incident on January 22, 2002 involving invasion of privacy. In all other respects we employed the discovery rule to permit plaintiffs to go forward on their other claims for invasion of privacy.

> condition of the premises...sustained by the employe, who, although not so engaged, is injured upon the premises occupied by or under the control of the employer, or upon which the employer's business or affairs are being carried on, the employe's presence thereon being required by the nature of his employment....

In addition to the original arguments contained in their motion to dismiss, in their reply brief regarding the within motion for reconsideration, defendants rely on the decision and analysis of our former colleague Chief United States District Judge for the Eastern District of Pennsylvania Edward N. Cahn in St. Luke's Hospital of Bethlehem v. O'Leary, No. Civ.A. 94-3724, 1994 U.S. Dist. LEXIS 17112 (E.D. Pa. November 28, 1994).

In O'Leary former Chief Judge Cahn held that the exclusivity provision of the WCA "does not merely bar claims by employees to recover for physical injuries, but also bars actions based upon emotional damage." O'Leary, at *12. Hence, in O'Leary, Chief Judge Cahn dismissed a claim for invasion of privacy because he found it was barred by the WCA.

In their opposition to defendants' original motion to dismiss, plaintiffs advanced two theories why the WCA does not bar their tort claims, including a claim for invasion of privacy, against defendants. First, plaintiffs asserted that defendants are precluded from raising the Workmen's Compensation Act defense

because defendants removed this action to federal court. Specifically, plaintiffs relied on the language of 28 U.S.C. § 1445 which provides: "A civil action in any State court arising under the workmens' compensation laws of such state may not be removed to any district court of the United States." 28 U.S.C. § 1445(c).

Second, relying upon the decision of the Supreme Court of Pennsylvania in Martin v. Lancaster Battery Company, 530 Pa. 11, 606 A.2d 444 (1992), plaintiffs averred that the Workmen's Compensation Act is not the exclusive remedy where fraudulent misrepresentation occurs, thus not every tort action is barred by the WCA.

In their response to defendants' within motion, plaintiffs rely on the decisions of the Superior Court of Pennsylvania in Urban v. Dollar Bank, 725 A.2d 815 (Pa. Super. 1999); Harris v. Easton Publishing Co., 335 Pa. Super. 141, 483 A.2d 1377 (1984); and Aquino v. Bulletin Company, 190 Pa. Super. 528, 154 A.2d 422 (1959). Specifically, plaintiffs assert that based upon the analysis contained in the Urban, Harris and Aquino cases, plaintiffs' claims for invasion of privacy are not barred by the Workmen's Compensation Act. For the following reasons, we agree with plaintiffs.

Initially, we note that both plaintiffs and defendants rely on cases not previously cited to the court in support of

their respective positions regarding the original motion to dismiss. Usually, new arguments are not addressed on a motion for reconsideration where the issues could have been previously raised. Farnsworth, supra. However, we conclude that in the interests of justice, and in the exercise of our discretion, we will address the all issues presented by the parties and consider the newly-cited authority in making our determination. See Caudill Seed and Warehouse Company, Inc. v. Prophet 21, Inc., 126 F.Supp.2d 937, 939 n1. (E.D. Pa. 2001).

A cause of action for invasion of privacy encompasses four analytically distinct torts: (1) intrusion upon seclusion; (2) appropriation of name or likeness; (3) publicity given to private life; and (4) publicity placing the person in a false light. Marks v. Bell Telephone Company of Pennsylvania, 460 Pa. 73, 85-86, 331 A.2d 424, 430 (1975). Plaintiffs' invasion of privacy claim alleges intrusion upon seclusion.

Section 652B of the Restatement (Second) of Torts provides:

> **§ 652B. Intrusion upon Seclusion**
>
> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of privacy, if the intrusion would be highly offensive to a reasonable person.

A cause of action for intrusion upon seclusion does not depend upon any publicity given to the person whose interest is

invaded or to his affairs. Restatement (Second) of Torts § 652B, comment a. However, the other three causes of action under the umbrella of invasion of privacy all require some measure of publicity.

In Urban v. Dollar Bank, supra, the Superior Court of Pennsylvania held that the Workmen's Compensation Act is designed to compensate a person for physical or emotional impairment which requires medical treatment that can form the basis for a disability under the WCA. The court further held that a cause of action for defamation "is designed to redress harm to one's reputation," and an injury to one's reputation is not a compensable injury under the WCA. 725 A.2d at 819, (citing Hammerstein v. Lindsey, 440 Pa. Super. 350, 655 A.2d 597 (1995) (Wieand, J., dissenting)).

Moreover, the Superior Court noted that not all injuries caused by employer misconduct are necessarily covered by the WCA. 725 A.2d at 820 n.6. Rather, the WCA is designed to compensate employees for a physical or emotional impairment, occupational disease, mental illness or psychiatric injury resulting from employment. An injury to reputation is not a personal injury, notwithstanding any concomitant physical or mental injury. 725 A.2d at 819.

In addition to the foregoing, in Harris and Aquino the Superior Court held that damages for invasion of privacy are

awarded in the same way that general damages are awarded in defamation cases. Restatement (Second) of Torts Section 652H provides that plaintiffs may recover damages for an invasion of privacy including: (1) the harm to their interest in privacy resulting from invasion; (2) their mental distress proved to have been suffered if it is of a kind that normally results from such invasion; and (3) special damage of which the invasion is a legal cause.

In this case, in their prayer for relief concerning Count XIII of the Complaint (Invasion of Privacy), plaintiffs do not claim any physical or emotional damages. Rather, they seek actual, statutory and punitive damages. While we know of no statutory damages for invasion of privacy, plaintiffs may attempt to prove actual and punitive damages if defendants are found liable for invasion of privacy.

Our review of the four distinct causes of action that encompass the tort of invasion of privacy leads this court to the conclusion that the torts of appropriation of name or likeness, publicity given to private life, and publicity placing the person in false light clearly involve the redress of harm to one's reputation. However, finding that the tort of intrusion of seclusion is a harm to one's reputation is a not as clear.

We address defendant's motion for reconsideration mindful of the standard of review for the original motion to

dismiss. At this stage of the proceedings, as we review plaintiff's intrusion-upon-seclusion claim we understand we should not grant a motion to dismiss unless it appears beyond a doubt that the plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. Graves v. Lowery, 117 F.3d 723, 726 (3d Cir. 1997).

With that standard of review in mind, we conclude that even if the information allegedly obtained by defendants were not publicly disseminated, plaintiffs' reputation may be damaged among defendants themselves. Any information obtained from the tape recording of plaintiffs' private conversations may result in defendants viewing plaintiffs in a less favorable light and possibly holding them in lower esteem. We conclude that it is not free and clear from doubt whether that circumstance would suffice to constitute harm to plaintiffs' reputation with regard to defendants even if the rest of the world is ignorant to the information known to defendants. Graves, supra.

Accordingly, because we can articulate some possible harm to plaintiffs' reputation, we conclude that it is not free and clear from doubt that plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. Graves, supra.

We find the decisions of the Superior Court of Pennsylvania cited by plaintiffs in Urban and the well-reasoned

dissent of Judge Wieand in Hammerstein persuasive. Moreover, we conclude that the state of the law has changed since Judge Cahn's 1994 decision in O'Leary. Therefore, we find defendant's reliance on that case misplaced.

Neither Judge Wieand's dissent in Hammerstein nor the Superior Court's subsequent decision in Urban were decided at the time of O'Leary. Thus, Judge Cahn did not have the opportunity to consider those well-reasoned decisions in his analysis. We decline to speculate what effect those decisions would have had on Judge Cahn's analysis. However, because we find the Superior Court decisions persuasive, we decline to follow Judge Cahn's decision.

We conclude that the decisions of the Superior Court of Pennsylvania in Harris, Aquino and Urban are compelling and persuasive authority for the proposition that the tort of invasion of privacy falls outside the WCA bar. "The opinions of intermediate state courts are 'not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court in the state would decide otherwise.'" Nationwide Mutual Insurance Company v. Buffetta, 230 F.3d 634, 637 (3d. Cir. 2000) (citing West v. American Telephone and Telegraph Co., 311 U.S. 223, 61 S.Ct. 179, 85 L.Ed. 139 (1940)). Hence, in the absence of any authority by the Supreme Court of Pennsylvania, and in the absence of any persuasive authority to compel a

different decision, we are compelled to follow the decisions of the Superior Court of Pennsylvania.

In applying the standard of review on a motion for reconsideration, we conclude that defendants have not shown either (1) the availability of new evidence not previously available; (2) an intervening change in controlling law; or (3) the need to correct a clear error of law or prevent manifest injustice. Brunson, supra. Accordingly, we conclude that our March 31, 2004 decision properly decided the issues before the court.

Conclusion

For all the foregoing reasons, we deny defendant's motion for partial reconsideration of the March 31, 2004 Order of the undersigned.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HAROLD L. CARE;	)	
LAWRENCE CLAAR;	)	Civil Action
TREANTAFFELO KARAHALIAS;	)	No. 2003-CV-04121
MICHAEL KLINE;	)	
GORDON KONEMANN;	)	
FRANCIS A. ROSSI; and	)	
LEE G. SMITH,	)	
	)	
Plaintiffs	)	
	)	
vs.	)	
	)	
THE READING HOSPITAL AND	)	
MEDICAL CENTER;	)	
JAKOB (JAPP) OLREE,	)	
Individually, and in His	)	
Capacity as Director of	)	
Facilities Management for The	)	
Reading Hospital and	)	
Medical Center, Inc.;	)	
JOHN AND JANE DOES 1 Through 20,	)	

Individually and in Their)
Capacities as Employees of The)
Reading Hospital and Medical)
Center, Inc.,)
)
Defendants)

O R D E R

NOW, this 31st day of March, 2005, upon consideration of the Motion for Partial Reconsideration of the Court's April 1, 2004 Opinion and Order, which motion was filed by defendants April 13, 2004; upon consideration of Plaintiffs' Answer to Hospital Defendants' Motion for Partial Reconsideration of the Court's April 1, 2004 Opinion and Order, which answer was filed April 23, 2004; upon consideration of the briefs of the parties; and for the reasons expressed in the accompanying Opinion,

IT IS ORDERED that defendants' motion for partial reconsideration is denied.

BY THE COURT:

/s/ JAMES KNOLL GARDNER
James Knoll Gardner
United States District Judge